# Jurisdictional Statement

81-546

No.

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS,
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# In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

*v.*

MARATHON PIPELINE CO.,

and

NORTHERN PIPELINE CONSTRUCTION CO.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Whether the exercise by bankruptcy judges of the jurisdiction defined in 28 U.S.C. (Supp. III) 1471, as provided by the Bankruptcy Act of 1978, violates Article III of the United States Constitution.

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*ON APPEAL FROM THE*
*UNITED STATES DISTRICT COURT*
*FOR THE DISTRICT OF MINNESOTA*

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The order of the district court (App. A, *infra*, 1a-2a) is unreported. The memorandum opinion (App. B, *infra*, 3a-26a) of the district court is not yet reported. The opinion of the bankruptcy court (App. C, *infra*, 27a-36a) is reported at 6 Bankr. Rptr. 928.

### JURISDICTION

The judgment of the district court (App. A, *infra*, 1a-2a) was entered on April 23, 1981. The notice of appeal (App. D, *infra*, 37a) was filed on May 19,

1981. On July 13, 1981, Justice Blackmun extended the time for docketing the appeal to and including September 16, 1981 (App. E, *infra*, 38a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in Appendix F, *infra*, 39a-44a.

## STATEMENT

In 1978, Congress enacted a comprehensive revision of the federal bankruptcy laws. Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. A central feature of the Bankruptcy Reform Act was a change in the structure and jurisdiction of the bankruptcy courts. Prior to 1978, federal district courts served as bankruptcy courts (see 11 U.S.C. 1(10)), but all proceedings in bankruptcy cases generally were held before bankruptcy referees unless the district court elected to withdraw the case from the referee. See Bankruptcy Rule 102.[1] The judgment of the referee was final unless appealed to the district court within 10 days. Bankruptcy Rules 801-803. The jurisdiction of the bankruptcy courts was defined in 11 U.S.C. 11. They were invested with "summary jurisdiction," which extended to controversies involving property in the actual or constructive possession of the court, such as property in the possession of the bankrupt during the proceedings, but did not have jurisdiction of "plenary" matters, such as those involving property in the possession of a third person,

[1] Since 1973, the bankruptcy referees were considered bankruptcy "judges." Bankruptcy Rule 901(7).

except by consent. See generally 2A *Collier on Bankruptcy* ¶ 38.09[2], at 1428-1435 (14th ed. 1978); Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 (Pt. I), 93d Cong., 1st Sess. 88-89 (1973) (hereinafter cited as "Commission Report").

The new Bankruptcy Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. (Supp. III) 151. Whereas bankruptcy referees previously were appointed for six-year terms by the district court, the judges of the new bankruptcy courts are to be appointed to 14-year terms by the President, with the advice and consent of the Senate, and are subject to removal for incompetence, misconduct or disability by the Judicial Council of the circuit. 28 U.S.C. (Supp. III) 152, 153. The new Act also eliminates the distinction between summary and plenary jurisdiction, giving the bankruptcy courts jurisdiction of "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(c).[2] Thus, subsequent to the filing of a petition pursuant to Title 11, the bankruptcy court may hear a variety of cases, including jury trials, which affect

[2] The Act specifies the bankruptcy jurisdiction of the district courts in 28 U.S.C. (Supp. III) 1471(a) and (b), but then provides in 28 U.S.C. (Supp. III) 1471(c) that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. (Supp. III) 1471(d) provides that the bankruptcy court or district court may abstain from hearing a particular Title 11 proceeding "in the interest of justice."

the property of the estate. 28 U.S.C. (Supp. III) 1472-1480.[3] In such cases, the bankruptcy court "shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. (Supp. III) 1481.

The new Act also specifies a procedure for taking appeals from the bankruptcy court. The circuit council is empowered to direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U.S.C. (Supp. III) 160. These panels have jurisdiction of all appeals from final orders of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. 28 U.S.C. (Supp. III) 1482. If no such appeals panel is designated, the district court exercises this appellate jurisdiction. 28 U.S.C. (Supp. III) 1334. The court of appeals is given jurisdiction of appeals from the appellate panels or the district court. 28 U.S.C. (Supp. III) 1293(a). If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. (Supp. III) 1293(b).

The Bankruptcy Act of 1978 provides for a transition period before the new Code takes full effect. Under Section 402(b) of the Act, 92 Stat. 2682, the provisions relating to the new bankruptcy courts do not formally become effective until April 1, 1984. During the transition period, the previously existing courts of bankruptcy continue in existence. Section 404(a), 92 Stat. 2683. The existing bankruptcy ref-

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[3] The "property of the estate" is broadly defined by the new Code in 11 U.S.C. (Supp. III) 541; it may include property in the possession of a third party.

erees, whose terms of office are extended until March 31, 1984, or until their successor takes office, are designated to serve as bankruptcy judges in the manner prescribed by the transition provisions. Section 404(b), 92 Stat. 2683.[4] Section 405 of the Act specifies that these bankruptcy judges will exercise the jurisdiction of the bankruptcy courts in all cases commenced under Title 11 during the transition period. That jurisdiction is defined in Section 405(b) by reference to 28 U.S.C. (Supp. III) 1471, although the latter section does not formally become effective until 1984. Similarly, the procedure for taking appeals from decisions of the bankruptcy judges during the transition period is essentially the same as the procedure described above that will become effective in 1984. Section 405(c), 92 Stat. 2685.[5]

2. On January 14, 1980, appellee Northern Pipeline Construction Company filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern initiated in that court (pursuant to 28 U.S.C. (Supp. III) 1471, made applicable by Section 405(b) of the new Bankruptcy Act) the instant proceeding against appellee Marathon Pipeline Company

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[4] During the transition period, under Section 404(d), 92 Stat. 2684, bankruptcy judges continue to be subject to removal from office by the district court for incompetency, misconduct, or neglect of duty pursuant to the old Bankruptcy Act, 11 U.S.C. 62(b).

[5] Under Section 405(c)(1)(C), an appeal of a bankruptcy judge's decision may be taken to the district court even if an appellate panel of bankruptcy judges has been established. Such an appeal is not available under the Act after the transition period. See 28 U.S.C. (Supp. III) 1334.

seeking damages arising out of Marathon's alleged "breaches of contract and warranty, misrepresentation, coercion and duress, extra work orders or quantum meruit" (App. C, *infra*, 28a).[6] Marathon sought dismissal of Northern's complaint, arguing that the Bankruptcy Reform Act of 1978, by purporting to give the bankruptcy judge jurisdiction over Northern's plenary proceeding, unconstitutionally vested Article III judicial powers in judges who lacked life tenure and protection against salary diminution. Because Marathon challenged the constitutionality of a federal statute, the United States intervened. Thereafter, the bankruptcy judge concluded that "the Congressional grant of power and jurisdiction made to the Bankruptcy Court in the Bankruptcy Reform Act of 1978 is proper and constitutional" (*id.* at 32a), and it denied the motion to dismiss (*id.* at 27a-36a).[7]

Marathon appealed to the district court. On April 23, 1981, the district court entered an order dismissing Northern's adversary proceeding against Marathon because "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judge to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority" (App. A, *infra*, 1a-2a). The United States and Northern filed notices of appeal

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[6] Prior to filing its reorganization petition Northern had filed suit against Marathon in the United States District Court for the Western District of Kentucky on the identical contract claims asserted here. That case is still pending.

[7] The bankruptcy judge also rejected Marathon's request to dismiss the adversary proceeding, or abstain from deciding it, because of the pending action in Kentucky, and he denied its request for a transfer of the action to the bankruptcy court in Kentucky (App. C, *infra*, 34a-36a).

to this Court and, on July 17, 1981, Northern docketed its appeal as No. 81-150. Thereafter, on July 24, 1981, the district court filed a memorandum (App. B, *infra*, 3a-26a) to supplement its order. The court found that "the 1978 Act by eliminating the summary-plenary distinction and bestowing all jurisdiction relating to bankruptcy to the courts of bankruptcy has transferred Article III judicial power to an Article I tribunal" (*id.* at 17a). Accordingly, while recognizing that other Article I courts had exercised varying degrees of "judicial power" in particular circumstances (*id.* at 18a-24a), the district court concluded that "necessarily concomitant to the increased powers, jurisdiction and independence of the bankruptcy judges are the life tenure and undiminishable salary guarantees of Article III of the United States Constitution. The creation of a court with such broad jurisdiction and power without the tenure and salary protections of Article III jeopardizes the independence of the entire judiciary" (*id.* at 10a-11a).

## THE QUESTION IS SUBSTANTIAL

1. The decision of the district court invalidates an integral part of Congress' comprehensive reform of the bankruptcy laws. Congress found that "the most severe problem in the bankruptcy administration was the court system." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 4 (1977). Specifically, Congress determined that the inability of the bankruptcy court to hear all matters affecting a debtor's assets or liabilities was a serious deficiency in the existing system. Accordingly, Congress determined that unification of jurisdiction in the bankruptcy court would eliminate delays that had impaired the prospects for rehabilita-

tion of the debtor and also unnecessary litigation expenses that sometimes had led to the abandonment of meritorious claims. H.R. Rep. No. 95-595, *supra*, at 44-46. See also Commission Report, *supra*, at 90-91.[8]

In restructuring the jurisdiction of the bankruptcy courts, Congress was mindful of the requirements of Article III. Expressly noting its independent obligation to assess the constitutionality of legislation (H.R. Rep. No. 95-595, *supra*, at 39), Congress solicited the views of several constitutional scholars (see

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[8] The Senate Report explained:

> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U.S. district court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 17-18 (1978).

*id.*, Appendix II at 63-87) and, after due consideration, determined that the bankruptcy court structure established by the new Act fully comports with the Constitution. Thus, the district court's decision both rejects Congress' considered judgment as to the constitutionality of the Bankruptcy Act and invalidates a critical aspect of the bankruptcy reform. Moreover, it casts doubt on the validity of countless pending bankruptcy proceedings that were initiated after October 1, 1979. Accordingly, the district court's decision plainly warrants plenary review by this Court.

2. a. Apart from the importance of the question presented here, further review is required because the district court's decision is erroneous. In order to avoid possible Article III problems, Congress did not create the new bankruptcy courts as independent courts. Rather, they have been established as "adjuncts" to the district courts and exercise jurisdiction that is vested directly in the district courts. S. Rep. No. 95-989, *supra*, at 18.[9] In response to the concerns expressed by several experts,[10] Congress limited the judicial powers that could be exercised by the bankruptcy courts by restricting their contempt power and prohibiting them from enjoining proceedings in other courts. 28 U.S.C. (Supp. III) 1481.

Moreover, all decisions of the bankruptcy courts are reviewable as of right by an Article III tribunal, either the court of appeals or both the district court and the court of appeals. 28 U.S.C. (Supp. III) 1293, 1334; Pub. L. No. 95-598, Section 405(c), 92

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[9] During the transition period, the bankruptcy judges "constitute a separate department of the district court." Pub. L. No. 95-598, Section 404(a), 92 Stat. 2683.

[10] See, *e.g.*, H.R. Rep. No. 95-595, *supra*, Appendix II at 81, 84, 87.

Stat. 2685. This Court has suggested in the past that, at least in civil cases, Article III is satisfied if an appeal to an Article III tribunal is available. See *Crowell* v. *Benson*, 285 U.S. 22, 48-54 (1932); see also *United States* v. *Raddatz*, 447 U.S. 667, 681-684 (1980); *Swain* v. *Pressley*, 430 U.S. 372, 382 n.16 (1977); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).

b. Even assuming that the new bankruptcy court structure does not satisfy the requirements of Article III, Congress legitimately acted within its power to create legislative courts under Article I, and hence the new Bankruptcy Act is constitutional. It is well established that all cases that come within the "judicial power of the United States," as defined by Article III, need not be heard by judges with salary protection and life tenure. Prior to 1875, the absence of a general statutory grant of federal question jurisdiction to the federal courts required that such cases be heard in non-Article III state courts. See *Palmore* v. *United States*, 411 U.S. 389, 401 (1973). Even today, cases asserting federally-created rights, with few exceptions, may be heard by state courts (see *Testa* v. *Katt*, 330 U.S. 386 (1947)), and diversity cases, which are within the defined judicial power of the United States, may be heard only by state courts if the amount in controversy is less than $10,000. See 28 U.S.C. 1332.

Since the earliest days of the Republic, this Court has approved the creation by Congress of legislative courts pursuant to its Article I powers. In *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), the Court sustained the creation of non-Article III territorial courts pursuant to Congress' Article I power to make rules respecting the terri-

tories of the United States. And this Court subsequently has sustained Congress' exercise of other Article I powers to create various other specialized Article I courts. See, *e.g.*, *Palmore* v. *United States*, 411 U.S. 389 (1973) (District of Columbia local courts); *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (Interstate Commerce Commission participation in bankruptcy proceedings); *Williams* v. *United States*, 289 U.S. 553 (1933) (Court of Claims); *Crowell* v. *Benson*, *supra*, 285 U.S. at 48-65 (workers' compensation proceedings); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts); *United States* v. *Coe*, 155 U.S. 76 (1894) (Territorial Court of Private Land Claims); *In re Ross*, 140 U.S. 453, 464-465, 480 (1891) (consular courts); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (military courts).[11]

Although we are aware of no decision of this Court holding that an Act of Congress establishing a non-Article III tribunal to adjudicate legal claims violates Article III, we assume *arguendo* that Article III bars Congress from essentially replacing an independent judiciary with Article I courts. Cf. *O'Donoghue* v. *United States*, 289 U.S. 516, 530-531 (1933). Nonetheless, this Court has held that "the requirements of Art. III * * * must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas

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[11] The Tax Court has also been established as an Article I court. See 26 U.S.C. 7441. The constitutionality of the Tax Court has been upheld although the issue has not been presented to this Court. See *Continental Equities, Inc.* v. *Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Hartman* v. *Switzer*, 376 F. Supp. 486, 490 (W.D. Pa. 1974); *Burns, Stix Friedman & Co.* v. *Commissioner*, 57 T.C. 392 (1971).

having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, *supra*, 411 U.S. at 407-408. For example, the Court has upheld the establishment of local courts for the District of Columbia without life tenure because of the need "to relieve the regular Art. III courts * * * from the smothering responsibility for [a] great mass of litigation." *Id.* at 408-409.

Thus, the decisions of this Court indicate that Congress has the power to establish Article I bankruptcy courts. Article I, Section 8, of the Constitution authorizes Congress "[t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Congress established the bankruptcy courts to deal with the specialized caseload resulting from its enactment of bankruptcy laws; hence, the jurisdiction of these courts is closely tied to Congress' Article I bankruptcy power. As in *Palmore*, the special bankruptcy courts relieve Article III courts of a great mass of complex litigation as well as reducing delays in the rehabilitation of bankrupts that would otherwise result from requiring bankruptcy litigation to be distributed among already overburdened district courts. Congress further determined that considerations of efficiency of the bankruptcy system require that all litigation concerning the property of the estate be centralized in the bankruptcy courts. See pages 7-8, *supra*. And in light of the uncertainty of the caseload under the new bankruptcy legislation, Congress has retained the flexibility to alter the number of bankruptcy judges according to need by specifying the appointment of bankruptcy judges for fixed terms, rather than for life. These important objectives justify the establishment of a specialized non-Article III court.

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1981

# Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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Civil 4-80-589

MARATHON PIPELINE COMPANY, PETITIONER

*vs.*

NORTHERN PIPELINE CONSTRUCTION CO., RESPONDENT

---

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Briggs & Morgan, by John Devney, 2200 First National Bank Building, St. Paul, MN 55101.

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ORDER

The Court, having heard the arguments of counsel and considered the files, briefs, and all relevant material, has concluded that the petitioner's motion to dismiss is meritorious and that the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority.[1]

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[1] Pursuant to 28 U.S.C. § 2403(a), Bankruptcy Judge John J. Connelly notified the Attorney General of the United States of this challenge to the constitutionality of 28 U.S.C. § 1471 as enacted by Public Law 95-598 (the Bankruptcy Reform Act) on November 6, 1978. The government was

Accordingly, IT IS HEREBY ORDERED That the adversary proceeding instituted by Northern Pipeline Construction Co. against Marathon Pipeline pursuant to the provisions of the Bankruptcy Code is dismissed.

IT IS FURTHER ORDERED That a stay of the provisions of this Order is granted pending appeal.

Dated: April 23, 1981

/s/ Miles W. Lord
MILES W. LORD
United States District Judge

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represented at the proceeding during which this Court decided to consider the merits of the appeal by an Assistant United States Attorney for the District of Minnesota. At that hearing, both parties and the government agreed to let the Court proceed without further argument on the merits and decide the matter in reliance on the briefs and memoranda already filed in the District Court or Bankruptcy Court, including that of the United States. In concluding that 28 U.S.C. § 1471 is an unconstitutional delegation of jurisdiction to an Article 1 Court, the Court has in fact considered the positions of all three entities.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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Civil 4-80-589

MARATHON PIPELINE COMPANY, PETITIONER

*vs.*

NORTHERN PIPELINE CONSTRUCTION CO., RESPONDENT

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Lindquist & Vennum, by Melvin I. Orenstein, 4200 IDS Center, Minneapolis, MN 55402.
Briggs & Morgan, by John Devney, 2200 First National Bank Building, St. Paul, MN 55101.

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MEMORANDUM

This action comes before this Court upon an appeal from an Order of the United States Bankruptcy Court for the District of Minnesota concluding that no constitutional infirmity invalidated the jurisdictional grant of authority under 28 U.S.C. § 1471.[1] On April 23, 1981, this Court issued an Order concluding that the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges empowering them to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority. Supplementing its Order, the Court makes the following Findings of Fact and Conclusions of Law.

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[1] Pub. L. No. 95-598, tit. II, 92 Stat. 2549 (1978).

## I. *Facts*

On March 8, 1979, respondent, Northern Pipeline Construction Co. (Northern) instituted a lawsuit against petitioner, Marathon Pipeline Company (Marathon) under 28 U.S.C. § 1332 in the United States District Court for the Western District of Kentucky, for claims arising out of a contract between the parties involving the construction of pipelines in Kentucky. That case is still pending. On January 14, 1980, Northern filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern initiated an adversary proceeding, against Marathon, under the Bankruptcy Code, asserting the same breach of contract claims asserted in its suit before the United States District Court for the Western District of Kentucky.[2] Marathon responded to this later complaint by filing a motion requesting an Order of the bankruptcy court dismissing the adversary proceeding for lack of jurisdiction. The bankruptcy court denied Marathon's motion to dismiss on November 17, 1980. Eleven days later Marathon filed an application for leave to appeal to this Court the bankruptcy court's order upholding its grant of jurisdiction under 28 U.S.C. § 1471. Marathon continued to press its claim that the bankruptcy court lacked the jurisdiction over the action for breach of contract as it involved an exercise of "the Judicial Power of the United States" which may be exercised solely by tenured judges as provided by Article III of the United States Constitution. This Court holds that 28 U.S.C. § 1471 is an unconstitutional delega-

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[2] Northern did omit a claim for relief based upon an alleged mechanics lien.

tion of Article III judicial power to nontenured judges.

II. *Jurisdiction and Powers*

28 U.S.C. [(Supp. III)] 151(a) creates the new bankruptcy courts as adjuncts to the federal district courts, and correspondingly, bankruptcy jurisdiction is vested by 28 U.S.C. § 1471(a) and (b) initially in the district courts. 28 U.S.C. § 1471(a) vests in the district courts "original and exclusive jurisdiction over all cases under title 11." 28 U.S.C. § 1471(b) confers on the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11."[3] Nevertheless, the ultimate repository of this jurisdiction is not the federal district court. 28 U.S.C. § 1471(c) assigns the jurisdiction granted to the district courts by subsections (a) and (b) to the bankruptcy courts. This assignment or transfer of jurisdiction from the district courts to the bankruptcy courts is mandatory, as the bankruptcy courts "shall exercise all the jurisdiction [so] conferred." Thus, the statutory scheme is constructed in such a manner as to remove with one hand what was just previously bestowed by the other.[4]

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[3] The primary distinction between the grants of jurisdiction of subsections (a) and (b) is that, while the former is original and exclusive, the latter is original but not exclusive. The non-exclusivity of jurisdiction in subsection (b) civil proceedings is a necessary corollary to the power granted in subsection (d) of section 1471, to the district court and the bankruptcy court to refrain from hearing a particular proceeding.

[4] This legislative sleight-of-hand was a response to the perceived constitutional problems surrounding such a grant of jurisdiction to the nontenured bankruptcy court. *See* 1 Collier on Bankruptcy, ¶ 3.01 (1980).

a. 28 U.S.C. § 1471(b)[5]

Section 1471(b) is a substantial enlargement over the grant of jurisdiction of the former bankruptcy courts. This fact was noted in the House Report to the legislation which ultimately became § 1471(b).

> Subsection (b) is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings under title 11 or arising under or related to cases under title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole bases for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle *everything* that arises in a bankruptcy case. (emphasis added). H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977).

The scope of "all civil proceedings arising under . . . or related to cases arising under title 11" is

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[5] Section § 1471 does not become effective until April 1, 1984. The new bankruptcy courts' jurisdiction during the transition period is governed by Pub. L. 95-598, Title IV § 405 (1978), which simply confers the same jurisdiction and powers as those scheduled to come into existence on April 1, 1984. Thus the same constitutional problems exist as to the jurisdiction of this interim court as exist with respect to the United States Bankruptcy Court which comes into existence in 1984. *See* 2 Collier on Bankruptcy, ¶ 201 [1] [d] (1980).

amazingly broad as it encompasses claims based on both federal and state law. An attorney who handled the bankruptcy reorganization of a major supermarket chain testified as to the potential breadth of this expanded jurisdiction. Included in the supermarket's five-year reorganization were such state law claims as disputes over the validity of contracts, landlord-tenant relationships, reclamation of ————, foreclosures of security interests, and alleged torts. At the same time the bankrupt was the defendant in an action to enforce collective bargaining agreements and a title VII employment discrimination action filed in response to massive layoffs. The trustee initiated an antitrust action against several of the supermarket's suppliers, and a securities fraud action against the parent corporation. Because each of these state and federal law disputes affected the bankrupt's assets, financial condition, and obligations, they were all "related to" the underlying reorganization proceeding and thus come within the present jurisdiction of the new courts of bankruptcy. *See* Bankruptcy Court Revision, Hearings on H.R. 8200 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. 95th Cong. 1st Sess. 18-27 (1977) (statement of J. Stanley Shaw). It is unnecessary to dwell on the myriad other fact situations that may come to mind.[6] It is evident that 28 U.S.C. § 1471(b) and its transition counterpart extend to the new courts

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[6] As Collier on Bankruptcy states[,] "[e]xamples of the reach of the jurisdiction of the new bankruptcy court could be multiplied *ad infinitum*. Conceptually, there is no limit to the reach of this jurisdiction, insofar as the matter involved "arises in or [is] related to" the title 11 case." 1 Collier on Bankruptcy, ¶ 3.01 [1] [e] (1980).

of bankruptcy a grant of jurisdiction that will equal, and in some instances exceed the jurisdiction of the federal district courts. As Collier on Bankruptcy notes[,] "[s]ection 1471(b) finds its analogue in 28 U.S.C. § 1331, which confers original jurisdiction upon the district courts." Collier, Bankruptcy, Appendix 1, ¶ 3.01 [1][d][ii] (1980). Indeed, the only significant difference is that an Article I bankruptcy judge's cases will be in some manner "related to" an underlying bankruptcy proceeding.

b. Powers of the bankruptcy court

The Bankruptcy Reform Act of 1978 concomitantly expands the powers of the bankruptcy courts under 28 U.S.C. § 1481.[7] Section 1481 states "[a] bankruptcy court shall have the powers of a court of equity, law and admiralty . . . ." As a court of equity the bankruptcy court has wide discretion to fashion new remedies where remedies at law are inadequate. *In re Evergreen Memorial Park Ass'n*, 308 F.2d 65 (3d Cir. 1962). As a court of admiralty the bankruptcy court has the power to sell property of an estate free of maritime liens. As a court of law the bankruptcy court has the power to award damages. Title 11 U.S.C. § 105 gives the bankruptcy court the

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[7] The jurisdiction of a court of bankruptcy under the old Bankruptcy Act was confined, essentially, to actions *in rem* and actions wherein the defendant had consented to its jurisdiction. Where the Court was deemed in possession of the debtor's property and the case involved the actual disposition of the debtor's property, the suit was heard by a bankruptcy referee as a "summary proceeding." All other matters affecting the debtor's assets were deemed "plenary" suits and were heard by a district court. *See* 1 Collier on Bankruptcy ¶ 3.01 [1] [b] (1980).

power to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." Under 28 U.S.C. § 1651 the bankruptcy court has the power to issue all writs necessary in aid of its expanded jurisdiction. Whereas the old bankruptcy courts were unable to hold jury trials, the new courts will have that power. 28 U.S.C. § 1480. Because specific types of contempt are not set out in the 1978 statute, as they were under the old Act, the bankruptcy courts are governed by 18 U.S.C. § 401, which allows the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) misbehavior of any person in its presence . . . (2) misbehavior of any of its officers in their official transactions (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command." This contempt power is restricted somewhat by 28 U.S.C. § 1481, where the bankruptcy court is denied the ability to punish criminal contempts not committed in its presence or those warranting a punishment of imprisonment. Finally, the bankruptcy court is granted the power to issue a writ of habeas corpus. 28 U.S.C. § 2256. In sum, the new bankruptcy court has the power to fashion remedies at law or equity, issue writs of execution and habeas corpus, punish all civil and some criminal contempts, conduct jury trials, and enter final judgments. Except for the inability to enjoin another court and the limitation over certain kinds of criminal contempt, the bankruptcy court is endowed with the full array of judicial powers. The Bankruptcy Reform Act of 1978, therefore, greatly expands the jurisdiction and powers of the bankruptcy courts.

Additionally, as courts of original jurisdiction, the bankruptcy courts control their own dockets and the district courts no longer have the discretion to refer matters to referees. Yet, while the new bankruptcy judges hear virtually the same range of matters and exercise nearly identical powers as an Article III district judge, these new judges are not Article III judges but rather Article I judges. Each bankruptcy judge holds office for a term of fourteen (14) years and can be removed from office for "incompetency, misconduct, neglect of duty or physical or mental disability" by a majority vote of the judicial council of his circuit. 28 U.S.C. § 153. This is to be contrasted with the life tenure guarantee under Article III § 1 of the United States Constitution [8] and the strict impeachment standard for "high crimes and misdemeanors" under Article II § 4 of the Constitution applicable to Article III judges. Bankruptcy judges shall receive a salary of $50,000 a year with cost-of-living adjustments. 28 U.S.C. § 154. This salary, however, is unprotected, and Congress may at its discretion choose to diminish it. This is not the case with an Article III judge, whose salary is guaranteed by Article III § 1. It is the conclusion of this Court that necessarily concomitant to the increased powers, jurisdiction and independence of the bankruptcy judges are the life tenure and undiminishable salary guarantees of Article III of the United States Constitution. The creation of a court with such broad jurisdiction and power without the tenure and salary

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[8] "Good Behaviour" has always been taken to mean tenure for life, with removal only according to the impeachment standard set forth in Art. II § 4. *See O'Donoghue v. United States*, 289 U.S. 516, 529-30 (1933).

protections of Article III jeopardizes the independence of the entire judiciary.

III. *The Bankruptcy Court is an Article I Court*

The above analysis concerning the nature of the bankruptcy court yields little more than an enumerative definition. The next step requires one to go beyond a mere listing of attributes and to inquire whether the bankruptcy court, so defined, is more appropriately characterized as an Article III court or an Article I court. This endeavor, while seemingly straightforward, is laden with uncertainty, as it requires an inquiry into the necessary and sufficient elements of an Article III court.

Chief Justice Marshall in *American Insurance Co.* v. *Canter*, 26 U.S. 511 (1928), remarked, " 'the judges both of the supreme and inferior court, shall hold their offices during good behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, . . ." *Id.* at 546. *Canter* then suggests that the qualities of life tenure and undiminishable salary define an Article III court. The bankruptcy court is an Article I court under this view. The Supreme Court, however, has also held that the true test for determining whether a tribunal is an Article III or Article I court lies "in the power under which the court was created and in the jurisdiction conferred." *Ex Parte Bakelite Corp.*, 279 U.S. 438, 459 (1929). Viewed in this light the bankruptcy court may be construed as an Article III court stripped of the Aticle III protections of life tenure and undiminishable salary rather than an Article I court vested with all the essential attributes of an Article III court. This latter interpretation clearly simplifies any constitu-

tional analysis, as all Article III court judges must necessarily be guaranteed life tenure and undiminishable salary. Finally, the Supreme Court has emphasized that explicit evidence as to congressional intendment concerning the proper classification of a particular tribunal may be relevant and highly persuasive. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 542 (1962). Discerning legislative intent is, at best, an endeavor giving rise to much speculation and conjecture. The House Judiciary Committee elicited responses on this very issue from a number of constitutional scholars. The majority of these experts concluded that the bankruptcy court is an Article I court. *See* H.R. Rep. No. 95-595. 95th Cong., 1st Sess., 63-87 (1977). This Court, for the purposes of further inquiry, agrees that the new bankruptcy court is an Article I court.[9]

## IV. *Constitutional Issues*

### a. Separation of powers

The basic concept encompassed by the doctrine of separation of powers is relatively straightforward. The Constitution explicitly enunciates what powers of the federal government are granted to which of three branches: i.e., the legislature, the executive and

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[9] It must be kept in mind that while many Article I tribunals, such as the Court of Claims, the Court of Customs and Patent Appeals (both now Article III courts 28 U.S.C. § 171 and 28 U.S.C. § 211), the late Court of Private Land Claims, the Consular courts, the Military Courts, the Superior Court of the District of Columbia, and the Courts of Bankruptcy are called courts, they are in reality agencies of the legislative or executive branch. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 599 (1962) (Douglas J. dissenting).

the judiciary. The doctrine of the separation of powers requires that "a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department of agency." *Williams* v. *United States*, 289 U.S. 553, 580 (1933). While recent authority suggests that *Williams'* rather rigid interpretation of the doctrine has softened, *Palmore* v. *United States*, 411 U.S. 389, 397-408 (1973); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 549-51 (1962) (opinion of Harlan J.), there can be no doubt that there exists a limit to Congress' power to create Article I tribunals and vest them with Article III jurisdiction and power. *Murrays Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *O'Donoghue* v. *United States*, 289 U.S. 516 (1933). The Court through Chief Justice John Marshall recognized that there are some matters which may be performed only by one branch of the government. It also noted that the boundaries separating one branch from another and the line delineating the powers of one branch from another "is a subject of delicate and difficult inquiry . . . ." *Wayman* v. *Southard*, 23 U.S. (10 Wheat) 1, 46 (1825). It is to that inquiry that this Court now turns.

Congress, under U.S. Constitution Article I, § 8, clause 4, has the authority "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States." Clause 18 of the same section gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." This is similar to Congress' plenary power to legislate for the District of Columbia conferred by Article I, § 8, clause

17, which enabled Congress to select the appropriate court, whether it is created by virtue of Article III or Article I, to hear and determine particular criminal cases within the District. *Palmore* v. *United States*, 411 U.S. 389 (1973). The Court of Customs Appeals "was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution" under Article I, § 8, clauses 1 and 18 of the Constitution. *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). The military courts are legislative courts created under Congress' authority to "make Rules for the Government and Regulations of the land and naval Forces." Article I, § 8, clause 14; *Toth* v. *Quarles*, 350 U.S. 11 (1955).

The constitutional basis for the jurisdiction of the new bankruptcy court is, then, not unlike that of many constitutionally valid Article I courts. Yet, an examination of these other Article I tribunals will reveal that they are much more limited courts, whose jurisdictions are restricted to discrete and specialized areas. The new courts of bankruptcy, on the other hand, are Article I courts—legislative agencies—that are completely independent of the judiciary with a jurisdictional reach as great and at times greater than that of the district courts.

b. Judicial power

The first Supreme Court pronouncement on the distinction between Article III (constitutional) courts and Article I (legislative) courts came in *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), where Chief Justice Marshall stated that legislative courts are "incapable of receiving" judicial power. *Id.* at 546. Clearly, the 1978 Bankruptcy Reform

Act cannot be considered a constitutional delegation of authority given this precedent,[10] unless one claims that all the cases that might arise under the bankruptcy court's expanded jurisdiction fall without Article III judicial power and are solely an outgrowth of Congress' power under Article I to enact bankruptcy legislation.[11]

As with most issues in this area confusion abounds over the question whether bankruptcy cases under the 1978 Act can be considered Article I cases, or whether they are now encompassed within the Article III "judicial power." Justice Story in *Mitchell* v. *Great Works Milling and Mfg. Co.*, 17 F. Cas. 497, 499 (C.C.D. Me. 1843) (No. 9662), made the following observation concerning the congressional power to confer jurisdiction on the district courts in plenary suits:

> To us it seems perfectly clear, that Congress possess a complete constitutional authority to

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[10] *Canter* indicates that within the states, admiralty cases, which are not cases "arising under the laws and Constitution of the United States," but, nevertheless, are a form of Article III judicial power, cannot be tried by legislative courts. *Id.* at 544-46. Thus the valid exercise of admiralty jurisdiction by the bankruptcy court is cast in doubt. *See also National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J. dissenting).

[11] Interestingly, this approach has its own constitutional problems. If all cases and proceedings arising under title 11 arise as a result of the exercise by Congress of its legislative (Article I) powers, then 28 U.S.C. § 1471 (a) and (b), which vest original jurisdiction of all cases under title 11, and all civil proceedings arising under or "related to" title 11 in the district courts, are an unconstitutional delegation of Article I power to an Article III tribunal.

> enact such a law for such an object; for the judicial power, by the constitution, extends "to all cases in law and equity, arising under the constitution and the laws and treaties made, or which shall be made under their authority," and further Congress are authorized "to pass uniform laws on the subject of bankruptcies throughout the United States." The Judicial power has, in this respect, under the constitution, always been construed to be coextensive with the legislative powers, upon the plain ground, that the constitution meant to provide ample means to accomplish its own ends by its own courts.

Clarity, however, had faded somewhat over the century resulting in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), where Justice Jackson argued that the jurisdiction of plenary suits arising out of bankruptcy proceedings was conferred upon the courts in an exercise of authority under Article I. *Id.* at 594. Nevertheless, this view of Article I power was rejected by six members of the Court. Justice Frankfurter, reasoning in much the same manner as Justice Story in *Mitchell*, stated:

> [I]n the exercise of its power to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the federal courts be utilized for all the claims that pertain to the bankrupt estate whether in the federal court in which the bankruptcy proceeding is pending or in a more convenient federal court. The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the

> federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies." It is a matter of congressional policy whether there must be a concourse of all claims affecting the bankrupt's estate in the federal court in which the bankruptcy proceeding is pending or whether auxiliary suits be pursued in other federal courts.

*Id.* at 652. This Court, following Justice Frankfurter's reasoning, agrees with Justice Rutledge's remark in *Tidewater* that "federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal question jurisdiction." *Id.* at 611.

Thus, the 1978 Act by eliminating the summary-plenary distinction and bestowing all jurisdiction relating to bankruptcy to the courts of bankruptcy has transferred Article III judicial power to an Article I tribunal. Indeed, it is the opinion of this Court that as jurisdiction to hear "all Cases, in Law and Equity, arising under this Constitution, the laws of the United States . . .," Article III, § 1, is judicial power and as the 1978 Act vests in the courts of bankruptcy a nearly identical jurisdictional reach, there is little doubt that such courts exercise Article III judicial power. To hold otherwise is to turn "judicial power" into some curious metaphysical concept dependent alone for its existence upon the particular forum in which a controversy is heard. Clearly, "judicial power" is more than just a label attached to certain tribunals and not to others. It is shorthand for the class of those powers uniquely resident in the judicial branch of the federal government. Jurisdic-

tion, the power to hear and decide a broad range of cases and controversies, is perhaps the most important aspect of judicial power.[12] The remaining question then becomes: Does 28 U.S.C. § 1471 confer an unconstitutional amount of judicial power upon the Article I bankruptcy court?

In *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929), the Supreme Court discussed at length a number of constitutionally valid Article I courts. The Court of Private Land Claims' "special function was that of hearing and finally determining claims founded on Spanish or Mexican Grants . . ." *Id.* at 456. The Choctaw and Chickasaw Citizenship Court was created to hear and determine controverted claims to membership in two Indian tribes. *Id.* at 457. The Court of Claims was created "as a special tribunal to examine and determine claims for money against the United States." *Id.* at 452. Claims against the government were traditionally handled by either Congress itself or some executive departments. These matters included "nothing which inherently or necessarily require[d] judicial determination." *Id.* at 453. Similarly, the Court of Customs Appeals, whose function was to review the acts of appraisers and collectors in appraising and classifying imports, was

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[12] Chief Justice Marshall left no doubt that "it is emphatically the province and the duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Note also, "An administrative officer in the discharge of his duties may have occasion to interpret and apply a law in order to enforce it, but he can have no such occasion in order to determine the rights of private litigants, since he may not be constitutionally authorized to take jurisdiction in respect to them." Opinion of the Justices. 87 N.H. 492, 495 (1935).

exclusively involved in matters "susceptible of performance by executive officers and had been performed by such officers in earlier times." *Id.* at 458.

The bankruptcy court is unlike any of these four courts. Its jurisdiction is by no means as narrow; and the bankruptcy court, by taking jurisdiction over plenary suits traditionally heard by the district courts, inherits through the new code a traditional judicial function.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Supreme Court upheld legislation which authorized an administrative agency to determine workman's compensation claims, i.e. private rights arising under federal law, subject to appellate review in an Article III court. *Crowell* does not mean that Congress can create legislative courts to hear any federal question as long as appellate review in an Article III court is available.[13] Such an interpretation renders meaningless the established fact that the life tenure and salary provisions of Article III apply with equal force to all levels of the judiciary. Furthermore, the language of *Crowell* fails to support such an interpretation. The opinion merely states that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts be made by judges." *Id.* at 51. The Court goes on to state that "[t]he statute has limited application, being confined to the relation of master and servant, and

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[13] In *Glidden* v. *Zdanok*, 370 U.S. 530 (1932), the Supreme Court held that Congress could not authorize the judges of a legislative court to sit by designation on an Article III court even though appellate review by an Article III tribunal was available.

the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, . . . ." *Id.* at 54. Indeed the Court explicitly recognizes a limitation upon Congress' power to confer judicial power upon non-Article III tribunals, remarking:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system.

*Id.* at 56-57.

The 1978 Bankruptcy Reform Act is hardly a statute of limited application. The bankruptcy court's jurisdiction will cover the entire range of state, federal, and constitutional law. The affairs of insolvent men are no less diverse than the affairs of men of more substantial means. Indeed no class of individuals needs the protections of an independent judiciary more than the bankrupt. The powers of the bankruptcy court far outstrip those of any administrative agency. It acts with the power and prestige of a federal court but without the commensurate degree of independence. It is this very notion of in-

dependence that lies at the heart of the doctrine of separation of powers.

The most recent Supreme Court treatment of this issue is *Palmore* v. *United States*, 411 U.S. 389 (1973), where the constitutionality of the District of Columbia's local court system was upheld. The Court rejected Palmore's claim that, as a defendant in a criminal proceeding arising under the laws of the United States,[14] he was entitled to be tried by an Article III judge. Congress, the Court remarked, exercised its power under Article IV to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" when it created the District's local court system. *Id.* at 402. The Court went on to state:

> It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state Courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to

[14] Section 22-3204 of the District of Columbia Code (1967) makes it a felony to carry an unregistered handgun in the District of Columbia.

specialized areas having particularized needs and warranting distinctive treatment.

*Id.* at 407-08. Congress then may confer upon non-Article III tribunals a limited amount of judicial power, i.e. the power to try cases arising under federal law in specialized areas having particularized needs and warranting distinctive treatment.

The Supreme Court makes clear the kind of tribunal the phrase "specialized areas" denotes. The local District of Columbia court system is "designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area." *Id.* at 408. The jurisdiction conferred on these courts is to try "cases arising under the District of Columbia Code and other matters of strictly local concern." *Id.* at 407. Thus, the local district courts function much like the state courts and virtually no state has found it necessary to provide for tenure during good behavior. *Id.* at 409. The Court simply treats the District of Columbia as a state. To do otherwise would clog the District's Article III courts with matters of local concern, thereby inhibiting those tribunals from doing the work they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress.[15] The Supreme Court suggests that Congress' power to legislate with respect to "specialized areas" is limited to discrete geographic areas. *Id.* at 402-03. *Palmore*, in this sense, returns full-circle to *American Insurance Co.* v. *Canter*, 26 U.S. 511, (1828). In *Canter*, the Court upheld Congress'

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[15] *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), held the Supreme Court and the Court of Appeals of the District of Columbia to be Article III courts.

power under Article I § 8 to establish Territorial Courts in Florida and vest them with admiralty jurisdiction. Congress could not, however, create an Article I court in any of the states and vest it with such jurisdiction. 26 U.S. 511, 546 (1828). While *Canter* is an unclear statement concerning the nature of judicial power insofar as it suggests that admiralty jurisdiction in one locality is not judicial power and in another it is, it clearly indicates that congressional power to confer such jurisdiction upon Article I tribunals is limited to distinct geographical areas.

Even if the concept "specialized areas" is not so limited, but also encompasses specialized subject matters, the new bankruptcy court's jurisdiction is an unconstitutionally broad delegation of judicial power. A wholesale transfer of Article III court jurisdiction cannot be constitutionally sanctioned simply because the recipient has unique responsibility over a particular subject matter. *Palmore*, therefore, holds only that Congress may confer a limited amount of judicial power on non-Article III tribunals where laws of national applicability and affairs of national concern are not at stake.

The bankruptcy court's jurisdiction is broad enough to concern it with laws of national applicability and affairs of national concern. The bankruptcy court's powers are not significantly different than those of the district court. As the House Judiciary Committee remarks:

> The bankruptcy court's general jurisdiction and broad judicial powers make it a true court, unlike specialized administrative tribunals. To the extent that it is a specialized forum, its

> specialization is unlike that of the Tax Court, where primarily issues under the Internal Revenue Code are decided; or of the Customs Court, or Court of Customs and Patent Appeals, where the range of issues is similarly limited. The nature of the work of the bankruptcy court militates strongly toward its establishment under Article III, because the bankruptcy law itself and the jurisdiction the court must exercise are "of national applicability." H.R. Rep. No. 95-595, 95 Cong., 1st Sess. 32 (1977).

In sum, the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges to try cases which are otherwise relegated under the Constitution to Article III judges is not analogous to the jurisdiction conferred by Congress upon other Article I courts. Title 28 U.S.C. § 1471 cannot be sustained as a valid exercise of Congress' power under Article I, § 8, cl. 4, to establish a uniform bankruptcy law. Rather, § 1471 is an unconstitutional delegation of Article III judicial power to a nontenured Article I court.

## V. *Conclusion*

One of the main reasons for reforming the bankruptcy court system was that under the old "referee" system the bankrutcy court was not truly and completely a court. It was not independent but had to operate under the supervision of a district court. This lack of independence hampered the bankruptcy court's operation both administratively and substantively. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 4 (1977).

One wonders, however, what measure of independence is gained through a court system that calls for

its judges to sit for a limited number of years constantly under the threat of removal from office by a majority vote of their judicial brethren and open to possible retaliation in the form of salary cuts from Congress. Indeed, vesting such a precariously situated court with nearly the full panoply of district court jurisdiction and power effectively denies every litigant tangentially connected with a bankruptcy an independent and impartial forum in which to have his dispute resolved, regardless of the nature of his dispute. In turn, as a significant number of cases and controversies are removed from the sphere of Article III court determination, upon the theory that Congress has the authority to legislate in a certain subject area, the independence of the entire judicial branch is compromised. For the bankruptcy power is no different in this respect than the power to regulate commerce or any other source of national legislation. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 86 (1977) (letter of Herbert Wechsler).

Our system of government is designed in such a manner that it requires the cooperation of two or more branches of the government to inhibit personal liberties. The Framers of our Constitution were aware that tyranny lies in the unaccountable exercise of government power. Each governmental branch serves as a check against the abusive use of power by the others. The tenure and salary provisions of Article III are crucial to an independent judiciary:

> Next to permanency in office, nothing can contribute more to the independence of the judges than fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human

> nature a power over a man's subsistence amounts to a power over his will; and we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

The Federalist No. 78 (A. Hamilton). The creation of a court system vested with broad federal question jurisdiction without the guarantees of life tenure and undiminishable salary disrupts the delicate balance of power in our federal system giving rise to the possibility of a lessening of our personal freedoms.[16]

Dated: July 24, 1981

/s/ Miles W. Lord
MILES W. LORD
U.S. District Judge

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[16] The tenure and salary protections in Article III are also important in the bankruptcy context, because by ensuring judicial independence they limit the extent to which the political branches of the federal government can encroach upon state-created rights through the use of Article I tribunals.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In Proceedings for a Reorganization Under Chapter 11

Case No. 3-80-66

IN THE MATTER OF:

NORTHERN PIPELINE CONSTRUCTION CO., DEBTOR

NORTHERN PIPELINE CONSTRUCTION CO., PLAINTIFF

*vs.*

MARATHON PIPELINE COMPANY, DEFENDANT

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Adversary Proceeding No. 80-0042

At Saint Paul, Minnesota.

MEMORANDUM AND ORDER

Northern Pipeline Construction Company ("Northern") commenced this adversary proceeding by filing a complaint on March 21, 1980. The Defendant, Marathon Pipeline Company ("Marathon"), responded to said complaint on May 12, 1980, by filing a motion for an order of the Court dismissing the complaint for lack of jurisdiction and alternatively to abstain or transfer this adversary proceeding on the grounds that there is another lawsuit pending in the United States District Court for the Western District of Kentucky containing essentially the same claims

for relief which are asserted in these proceedings. The ground asserted in support of the claim of lack of jurisdiction is that the exercise of jurisdiction herein by the Bankruptcy Court is an unconstitutional exercise of the jurisdictional power granted solely to the courts of the United States under Article III, Section 1 of the United States Constitution.

A hearing was held on Defendant's motion pursuant to notice duly given on May 22, 1980 in the United States Court House, 316 North Robert Street, St. Paul, Minnesota. John L. Deveny of the law firm of Briggs and Morgan, St. Paul, Minnesota, appeared on behalf of the Plaintiff and Melvin I. Orenstein of the law firm of Lindquist & Vennum, Minneapolis, Minnesota, appeared on behalf of the Defendant. The Court, subsequent to said hearing, pursuant to 28 U.S.C. § 2403(a) informed the United States Attorney General of the constitutional issue present in this litigation. Thereafter, on September 10, 1980, the United States of America moved the Court to allow the United States of America to intervene in the above-captioned proceedings as a matter of right under Rule 24(a)(1), Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a). The Court entered its order granting the motion to intervene on September 10, 1980.

Northern is a Debtor in a proceeding for Reorganization under Chapter 11 of the Bankruptcy Code and has commenced the present action against Marathon for damages estimated to be approximately $2,500,000.00 arising out of Marathon's breaches of contract and warranty, misrepresentation, coercion and duress, extra work orders or quantum meruit.

This proceeding is of the sort that this Court had no statutory jurisdiction to hear prior to the passage

of the Bankruptcy Reform Act of 1978. The Reform Act created a new court and substantially enlarged the jurisdiction of the former Bankruptcy Courts.

Defendant's motion to dismiss raises a constitutional issue by asserting that the Bankruptcy Reform Act of 1978 has unconstitutionally vested Article III judicial power in non-tenured judges and thus the Bankruptcy Court is barred from exercising jurisdiction over this litigation because it lacks jurisdiction over the subject matter of this litigation.

## JURISDICTIONAL ISSUE

The Defendant urges that the Bankruptcy Reform Act of 1978 expanded the jurisdiction of the Bankruptcy Court so that it may now hear and try the same cases which are heard and tried by Federal District Court under the jurisdiction provisions of Article III of the Constitution and thus the Bankruptcy Court is therefore exercising the "judicial power" of the United States as set forth in Article III. The Defendant further urges that Congress having created a Bankruptcy Court with jurisdiction equivalent to that of the United States District Court must also give the judges of the Bankruptcy Court life tenure and a salary which may not be reduced. The Defendant correctly points out that the judges of the new Bankruptcy Court are not life tenured. 28 U.S.C. § 153(a). The Defendant, from the foregoing concludes that the Bankruptcy Reform Act of 1978 has unconstitutionally vested Article III judicial power in non tenured judges and that being so the Bankruptcy Court is barred from exercising that jurisdiction and, absent such power, this Bankruptcy Court has no jurisdiction over the subject mat-

ter of this litigation and the complaint should therefore be dismissed.

The Plaintiff on the other hand sees the issue to be whether the judicial powers under Article III of the Constitution may be bestowed upon Article 1 Courts and concludes citing *Palmore* v. *United States*, 411 US 389 (1973) that Congress can grant judicial powers to Article I courts and in the Bankruptcy Reform Act of 1978 has done so, creating a new Article I court of record to be known as the United States Bankruptcy Court.

The United States position set forth in its brief in that "The changes effected by the Reform Act reflect nothing more than a revision in accordance with prior practice in the Bankruptcy Court." The United States notes a significant change from the practice in effect prior to the adoption of the Reform Act and calls it constitutionally irrelevant as being only the expressed intention of Congress to remove the consent of the defendant as a precondition for the exercise of jurisdiction by the Bankruptcy Court. The United States asserts that the jurisdiction of Bankruptcy Courts is derived from Congressional powers under Article I and not from the grant of judicial power under Article III of the Constitution and adjudication of controversies in Bankruptcy proceedings is an exercise of Congress' plenary power over the law of bankruptcy under Article I and not at all the exercise of the judicial power of the United States under Article III. *United States* v. *Raddatz* ——, U.S. ——, 100 S Court 2406 (1980), *United States* v. *Kras*, 409 U.S. 434 (1973).

Section 201(a) of Title II of the Bankruptcy Reform Act of 1978, 28 U.S.C. § 151, created a new

court of record known as the United States Bankruptcy Court. This legislation provides that there shall be a bankruptcy court in each judicial district which will be an "adjunct to the district court for such district." 28 U.S.C. § 151(a). It was further provided that such "bankruptcy court shall consist of the bankruptcy judge or judges for the district". 28 U.S.C. § 151(b). These judges who collectively constitute the new bankruptcy court are to be appointed by the President with the advice and consent of the Senate.

The Jurisdiction of the bankruptcy court is provided in 28 U.S.C. § 1471. The court is given "original and exclusive jurisdiction over all cases under title 11" § 1471(a), and "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11", § 1471(b). Further, the bankruptcy court in any given district "shall exercise all of the jurisdiction conferred by § 1471 . . . on the district courts." § 1471(c).

This grant of jurisdiction, most notably § 1471(b), is a substantial enlargement of the jurisdiction of the former bankruptcy courts. This fact was noted in the House Report to the legislation which ultimately became § 1471(b).

> "Subsection (b) is a significant change from current law. It grants the Bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings under title 11 or arising under or related to cases under title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal

district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. H.R.Rep. No. 595, 95th Congress, 1st Session, 445 (1977)."

Based on the references to legislative history provided in the filed briefs it is clear that Congress did create a new court, the Bankruptcy Court as an Article I Court, and when it did so it was fully apprised of the constitutional considerations posed by Article I and Article III of the United States Constitution. Congress determined that it preferred and had the power to utilize a court staffed by judges without lifetime tenure and created a court with attendant judgeships with service terms of fourteen years.

All Acts of Congress are presumed to be constitutional. Resolving every doubt in favor of constitutionality and indulging in a strong presumption of constitutionality, as this Court must, the only conclusion this Court may reach is the Congressional grant of power and jurisdiction made to the Bankruptcy Court in the Bankruptcy Reform Act of 1978 is proper and constitutional. This Court does have jurisdiction to hear and determine the plaintiff's claim now pending in the adversary proceeding before the Court.

## DISMISSAL BY REASON OF ANOTHER PENDING ACTION

Alternatively Marathon moved the Court for an order dismissing this proceeding on the grounds that there is a lawsuit pending against Marathon instituted by Northern in the United States District Court for the Western District of Kentucky arising out of the same cause of action being asserted in

these proceedings and Northern is barred from instituting these proceedings having failed to pursue its right of removal within the time limit specified under Rule 7004 of the Interim Bankruptcy Rules adopted by this Court.

The action by Northern against Marathon in the Western District of Kentucky was commenced some time before the filing of the Debtor's Chapter 11 proceedings on January 14, 1980, and is still pending. Marathon asserted a counter claim in that action which is affected by the automatic stay provisions of the Bankruptcy Code. The stay provisions of 11 U.S.C. § 362 and Rule 401 of the Bankruptcy Rules reach claims asserted against but not claims asserted by the debtor.

A pending action will not abate because of the filing of a bankruptcy petition by the plaintiff, nor is the pendency of an action in one court a bar to a subsequent action for the same relief. A litigant has a right to have his action tried wherever he can find venue.

Since this action was commenced in the United States District Court, Western District of Kentucky, Northern's financial condition has deteriorated substantially. The commencement of this proceeding in Minnesota Bankruptcy Court was a calculated move made by the Debtor for its convenience as dictated by its financial condition. The Bankruptcy Code contemplates that this may be done. Section 1478 of the Bankruptcy Code is not a bar to pursuing a pending claim other than by exercising the removal mechanisms of Section 1478. The removal provisions of Section 1478 provide one way to get an action pending in another court before the Bankruptcy Court—it is not an exclusive avenue—Northern has achieved its desire to litigate this case in its home district by commencing a new action in the

Bankruptcy Court in the district where it filed its original petition. This alternative is permissible under the new Bankruptcy Code.

## ABSTENTION FROM A PROPER EXERCISE OF JURISDICTION

Defendant urges that the Court should refrain from exercising jurisdiction, deferring in the interest of justice to the District Court for the Western District of Kentucky. The Court Northern originally selected is a proper forum for the litigation of the type of claim here involved. Marathon asserts that the Court in Western District of Kentucky is the one forum in which full relief can be afforded the parties because of the foreclosure of a mechanics lien asked for in that original action and thus this Court cannot afford full relief to the parties because Northern in order to foreclose its lien would have to do so in a Kentucky Court.

The Bankruptcy Code authorizes abstention "in the interest of justice." The existence of the mechanics lien claim pending in Kentucky would in no way cause difficulty to a resolution of the basic claims in the Minnesota Court. This matter may be fully adjudicated here and if necessary Northern could then proceed to Kentucky to foreclose its lien. The litigation in the Western District of Kentucky has not ripened to the extent that that is the one case to proceed with out of the two cases that are now pending one in Kentucky and one in Minnesota. Of consideration to the Court is the financial condition of Northern. To require it to litigate this claim in Western District of Kentucky would impose an additional hardship on a company that is not now in a normal operating posture. It is in financial

difficulties and this Court is satisfied that venue of this action has been properly laid in this Bankruptcy Court in Minnesota. The Defendant has failed to make a showing which would require this Court to abstain.

## TRANSFER OF THIS ACTION

Marathon's final argument is that in the event that the Court does not dismiss the action, nor abstain from exercising jurisdiction, venue should be transferred to the Bankruptcy Court of the Western District of Kentucky pursuant to § 1475 of the Bankruptcy Code. This Court, once having accepted jurisdiction of the litigation should proceed with caution of any request to transfer the litigation from this District to another District. Marathon asserts that it is in the interest of justice and convenience of all the parties to require that this action be transferred to the Bankruptcy Court of the United States District Court for the District of Kentucky pursuant to 28 U.S.C. § 1475. The dispute presented in this litigation arose out of the construction of facilities located in Jefferson County, Kentucky. Northern voluntarily venued its original suit in that District where it did business under the contract between the parties. Proceedings in Kentucky are not necessarily more convenient and inexpensive as those terms are understood by § 1475 of the Bankruptcy Code and 28 U.S.C. § 1404(a).

One of the factors to be examined in determining the "the convenience of the parties" is the relative economic ability of the litigants to bear the expense of trial in a particular forum. Northern is a corporation with its princip[al] place of business in Minnesota and presently has no operations in the state of Kentucky. Marathon is a national corporation

which is licensed to do business in Minnesota. The cost to Northern, presently a debtor in a Chapter 11 proceedings through reorganization, would necessarily be greater in Kentucky than in Minnesota. The average cost of travel and transportation of witnesses residing in this state which would be necessitated by further proceedings in Kentucky must be considered. Weighing the relative expense and inconvenience between the parties, the Court is satisfied that the interest of justice favor keeping this case in Minnesota. ACCORDINGLY, IT IS ORDERED that the Defendant Marathon['s] motion to dismiss this action for lack of jurisdiction on the grounds that the exercise of jurisdiction herein by the Bankruptcy Court is an unconstitutional exercise of the jurisdictional power granted solely to the Courts of the United States under Article III, Section 1 of the United States Constitution be and the same is hereby denied.

IT IS FURTHER ORDERED that in all other respects, the motion to dismiss this proceedings on the grounds that there is a lawsuit pending against the Defendant in the United States District Court for the District of Kentucky arising out of the same cause of action, or in the alternative to abstain from hearing this matter in the interest of justice and alternatively to transfer the proceedings to the Bankruptcy Court of the United States District Court for the Western District of Kentucky in the interest of justice and the convenience of parties be and the same are hereby denied.

Dated and entered this 17th day of November, 1980.

/s/ John J. Connelly
JOHN J. CONNELLY
U.S. Bankruptcy Judge.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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Civil No. 4-80-589

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MARATHON PIPELINE COMPANY, PETITIONER

*v.*

NORTHERN PIPELINE CONSTRUCTION CO., RESPONDENT

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# NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

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[Filed May 19, 1981]

The United States of America hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252 and 2101(a), from the judgment of this Court entered on April 23, 1981.

Dated: May 19, 1981.

JOHN M. LEE
United States Attorney

/s/ By: Mary L. Egan
MARY L. EGAN
Assistant United States Attorney
234 United States Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401
(612) 332-8961 FTS 781-7430

APPENDIX E

SUPREME COURT OF THE UNITED STATES

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No. A-16

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UNITED STATES, APPELLANT
*v.*
MARATHON PIPELINE COMPANY AND
NORTHERN PIPELINE CONSTRUCTION COMPANY

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ORDER

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UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including September 16, 1981.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of July, 1981.

## APPENDIX F

Article I, Section 8, of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States * * *.

Article III, Section 1, of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 404(a) of Pub. L. No. 95-598, 92 Stat. 2683, provides:

> The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

Section 405 of Pub. L. No. 95-598, 92 Stat. 2685, provides in pertinent part:

(a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except—

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be—

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

28 U.S.C. (Supp. III) 151 provides in pertinent part:

(a) There shall be in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

28 U.S.C. (Supp. III) 1293 provides:

> (a) The court of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.
>
> (b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

28 U.S.C. (Supp. III) 1334 provides:

> (a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.
>
> (b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.
>
> (c) A district court may not refer an appeal under that section to a magistrate or to a special master.

28 U.S.C. (Supp. III) 1471 provides:

> (a) except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

28 U.S.C. (Supp. III) 1481 provides:

A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

28 U.S.C. (Supp. III) 1482 provides:

(a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals

from all final judgments, orders, and decrees of bankruptcy courts.

(b) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.

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